SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-000253 10/26/2004

HONORABLE CATHY M. HOLT

CLERK OF THE COURT
E. Schneider
Deputy

FILED: 10/27/2004

MARK ANDREW AUSTIN EDWARD H BRITT

v.

CRYSTALTECH WEB HOSTING, et al. STEPHEN M HOPKINS

MINUTE ENTRY

The Court took under advisement Defendant CrystalTech Web Hosting, Inc.'s (herein "Crystaltech") Motion for Summary Judgment, Plaintiff Mark Andrew Austin's (herein "Austin") Cross-Motion for Summary Judgment and Defendant John M. Daniels' (herein "Daniels") Motion to Dismiss for Lack of Personal Service and Lack of Personal Jurisdiction (herein "Motion to Dismiss"). The Court has considered the motions, arguments and case law and makes the following findings and orders:

This case arises out of alleged defamatory statements published by Defendants Daniels and CrystalTech, upon which Plaintiff Austin asserts claims of defamation, consumer fraud and negligence. Defendant CrystalTech, an Arizona corporation located in Maricopa County, operates an Internet website hosting company. *Defendant CrystalTech's Motion to Dismiss*. In its capacity as such, Defendant CrystalTech provides web-hosting services to its customers. *Exhibit B, Defendant CrystalTech's Statement of Facts in Support of its Motion for Summary Judgment.* Plaintiff Austin operates a business relating to the travel industry throughout Thailand and Bali, Indonesia. *Exhibit D, Plaintiff Austin's Separate Statement of Facts*. Defendant Daniels also operates a business relating to the travel industry in Bali, Indonesia. *Paragraph 2, First Amended Complaint*. Plaintiff Austin's claims are premised on the allegation that Defendants Daniels and CrystalTech "are publishing, broadcasting, transmitting, and/or distributing, through the use of the internet, certain statements regarding criminal activity or other conduct negatively impacting the tourism industry in Bali, Indonesia, which are false and defamatory in nature." *Plaintiff Austin's Amended Complaint.* As to Defendant CrystalTech's

culpability, Plaintiff Austin alleges that he requested that Defendant CrystalTech remove certain alleged defamatory statements from the website and CrystalTech refused, thereby contributing to the publication of defamatory statements. *Exhibit B, C & D, Plaintiffs Separate Statement of Facts.*

I. Defendant CrystalTech's Motion for Summary Judgment & Plaintiff Austin's Cross-Motion for Summary Judgment.

Defendant CrystalTech requests summary judgment on all Plaintiff's claims asserting that as a website operator it is statutorily immune from liability under 47 U.S.C. § 230 and *Zeran v. America Online, Inc.*, (4th Cir. 1997) 129 F.3d 327, 332, certiorari denied (1998) 524 U.S. 937 [118 S.Ct. 2344, 141 L.Ed.2d 712]. Defendant also contends that even if the Court does not conclude that Defendant is immune under 47 U.S.C. § 230, under common law it is not liable as it neither knew nor had reason to know Defendant Daniels' statements were defamatory. Plaintiff Austin, in response, requests summary judgment asserting that §230 did not abrogate common law "distributor liability;" and, therefore, Defendant CrystalTech, having had knowledge of defamatory statements prior to republication, is liable. In support of his contentions, Plaintiff Austin relies solely on *Barrett v. Rosenthal*, (Cal.App. 1 Dist.)(2004) 9 Cal.Rptr.3d. 142, review granted, (Cal. Apr. 14, 2004) 97 P.3d 797, 12 Cal.Rptr.3d 48.[1] However, this Court adopts the reasoning of *Zeran* and concludes that an internet website host such as Defendant CrystalTech is immune from liability for allegedly defamatory statements posted by third parties. *See Zeran*, 129 F.3d 327; *Ben Ezra, Weinstein and Co. v. America Online, Inc.*, 206 F.3d 980,986 (10th Cir. 2000); *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.D.C. 1998); *Noah v. AOL Time Warner, Inc.*, 261 F.Supp.2d 532 (E.D.Virginia 2003); *Doe v. America Online Inc.*, 783 So.2d 1010, 1013-17 (Fla. 2001).

Title V of the Telecommunications Act of 1996 (herein "Act") was enacted to control the exposure of minors to indecent materials. *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003) (*citing* Pub.L. No. 104-104, Title v. (1996) & H.R.Rep. No. 104-458, at 81-91 (1996)). Although parts of the Act have been struck down as unconstitutional, § 230 remains valid. *Batzel*, 333 F.3d at 1026. The specific provision in this case, § 230 (c)(1), overrides the traditional treatment of "publishers" under both statutory and common law. "As a matter of policy, 'Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others.'" *Id*. (citing *Blumenthal*, 992 F.Supp. at 49 (D.D.C. 1998)). Absent §230, a person who publishes defamatory speech of a third person over the Internet could potentially be held liable. *Batzel*, 333 F.3d at 1027 (citing *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y.Sup. May 24, 1995)).

[1] California is the only jurisdiction to find "distributors" excluded from the immunity granted under 47 U.S.C. § 230.

Under 47 U.S.C. § 230(c)(1) [n]o provider or user of an interactive computer services shall be treated as a *publisher* or *speaker* of any information provided by another information content provider." The plain language of the statute indicates that "interactive computer service providers" are immune from liability for information originating from a third-party user of the service. *Zeran*, 129 F.3d at 330. The statute prevents courts from entertaining claims that would place a computer service provider in a *publisher's role*. *Id*. In this case, there is no dispute that Defendant CrystalTech is a "computer service provider" within the context of §230.

The premise of Plaintiff Austin's argument is that "distributors" are not "publishers" within the context of §230 (c)(1). In Plaintiff's view, the term "distributor" carries a legally distinct meaning separate and apart from that of a "publisher." Plaintiff Austin argues that because Congress did not expressly immunize providers from liability as a "distributor" of information, common law "distributor liability" is a viable basis upon which to base his claim(s). Under Plaintiff's view, if Congress intended to abrogate "distributor liability", thereby immunizing "distributors" from liability, it would have added the word "distributor" to the text of the statute. However, such an interpretation is inconsistent with the plain language of the statute taking into consideration the common law of defamation. *Zeran*, 129 F.3d at 327.

The distinction between "publisher" and "distributor" derive their legal significance from the context of defamation law and is one relating to standard of liability[2]. *Zeran*, 129 F.3d at 332 (*citing* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* §113, at 799-800 (5th ed. 1984). In order to succeed on a claim for defamation, a party must establish that the defendant published the statement. *Zeran*, 129 F. 3d at 332; Rest.2d Torts § 558 (b) (1977); Keeton et al., *supra*, §113, at 802. A publication does not only arise as a result of an author's conscious decision to include certain information, but also upon one's negligent communication of a defamatory statement and the failure to remove a known defamatory statement after first being communicated by a third party. *Zeran*, 129 F.3d at 332; Rest.2d Torts §§577, 581. Every repetition of a defamatory statement is considered a publication. *Zeran*, 120 F.3d at 332; Keeton et al., *supra*, §113, at 799. Under defamation law, "distributors" are considered "publishers":

[2] A "primary publisher", such as the author, printer or publishing house is presumed to know the truthfulness of the information disseminated and to have the ability to control the content and is therefore liable for the wrongful dissemination of information irrespective of actual knowledge. *Zeran*, 129 F.3d at 331 (*citing* Keeton et. al., *supra*, § 113, at 810 (5th ed. 1984); Rest.2d Torts, § 581, subd. (1), com. c. Conversely, distributors, such as bookstores and libraries that generally lack the ability to control content are liable only if they knew or had reason to know that the information disseminated was defamatory. *Zeran*, 129 F.3d at 331 (*citing* Keeton et al., *supra*, § 113, at 811); Rest.2d Torts, § 581, subd. (1), coms. b, c, d, and e. Distributors who neither knew nor had reason to know that information transmitted was harmful are treated as "mere" conduits to the dissemination of information and are immune from liability. *See Zeran*, 129 F.3d at 332 (as a prerequisite to liability distributors are required to have actual knowledge of the existence of defamatory statements); Rest.2d Torts, § 581, subd. (1) ("…[O]ne who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character").

> Those who are in the business of making their facilities available to disseminate the writings composed, the speeches made, and the information gathered by others may also be regarded as participating to such an extent in making the books, newspapers, magazines, and information available to others as to be regarded as publishers. They are intentionally making the contents available to others, sometimes without knowing all of the contents – including the defamatory content – and sometimes without any opportunity to ascertain, in advance, that any defamatory matter was included in the matter published.

Keeton et. al., *supra*, §113, at 803. Consistent with the common law of defamation, "publisher" under 47 U.S.C. §230 (c)(1) encompasses both "primary publishers" and "distributors" of information. Therefore, regardless of whether Defendant CrystalTech is a "primary publisher" or a "distributor" of information, it is immune from liability under §230. This interpretation is also consistent with the purposes underlying §230.

In connection with enacting 47 U.S.C. §230, Congress specifically recognized the significant benefits the Internet has had on society. Congress recognized as a finding that "[t]he rapidly developing array of Internet and other interactive computer services available to individuals represent an extraordinary advance in the availability of educational and informational resources to our citizens." 47 U.S.C. §230(a)(1). In addition, Congress specified that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation" and that "[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services." *Id*. at § 230(a)(4) & (a)(5). The primary policy justifications underlying Congress' enactment of § 230 were to encourage the unfettered and unregulated development of free speech, promote the continued development of e-commerce and to remove the disincentives for the development and utilization of blocking and filtering technologies. 47 U.S.C. §230 (a); *Batzel*, 333 F.3d at 1027; *Zeran*, 129 F.3d at 330-331. Taking into consideration Congress' findings and its policy justifications, it is evident that Congress granted immunity to computer service providers in response to its concern for the effects of tort liability on freedom of speech in the new and developing Internet medium. *Batzel*, 333 F.3d at 1028; *Zeran*, 129 F.3d at 330.

Exposing computer service providers to liability as "distributors" upon notice of defamatory statements or other potentially injurious content would discourage free speech on the Internet. *Zeran*, 129 F.3d at 333. In this situation, computer service providers would be forced to investigate each alleged defamatory statement or improper content on its system and make on-the-spot decisions as to its nature and significance. *Id.* Providers would be forced to decide whether to risk liability or continue publication. *Id.* If the provider did not undertake such action, it would then be foreclosed from asserting that it did not have reason to know of the alleged improper content. There are over 40 million people worldwide that utilize the Internet. *Id.* at 328 (citing *Reno v. ACLU*, 521 U.S. 844, ---, 117 S.Ct. 2329, 2334, 138 L.Ed.2d 874 (1997)). The number of postings on interactive computer services would create an unreasonable burden in the context of the ever developing Internet era. *Id*. at 333. Liability being imposed for the failure to remove and not for its removal, the natural tendency for computer service providers

would be to remove alleged improper content upon notification, irrespective of its nature or significance. *Id.* (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777, 106 S.Ct. 1558, 1564, 89 L.Ed. 2d 783 (1986)). To impose liability on "distributors" would have a chilling effect on the freedom of Internet speech. Naturally, this chilling effect would have a cascading effect on e-commerce. Businesses engaged in electronic commerce would have the same incentives to remove any alleged improper content rather than risk liability.

Exposing internet service providers to liability would also frustrate Congress' intent to encourage service providers to self-regulate the dissemination of offensive material. Under § 230 (b)(4), Congress recognized its desire to "remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." In this respect, Congress enacted § 230 to remove the disincentive to self-regulation created by *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). In *Stratton Oakmont*, the plaintiff sued Prodigy Services Company, an interactive service company, alleging defamation. The alleged defamation arose as a result of a third-party's defamatory statements posted on Prodigy's bulletin board. The court declined to treat Prodigy as a "distributor" for purposes of liability because Prodigy had voluntarily assumed the role of an original publisher – Prodigy had advertised its practice of controlling content on its service and actively screened and edited messages on its bulletin. Absent § 230, a computer service provider who assumes the responsibility of regulating the dissemination of information on its system could be held liable as a primary publisher.

Although *Stratton Oakmont* dealt with an internet service provider who had assumed the responsibilities of an "original publisher," it would likely follow that immunizing "distributors" under § 230 would promote self-regulation. The Court by immunizing "distributors" eliminates the disincentive to the establishment of certain blocking and filtering technologies. *Zeran*, 129 F.3d at 333. A decision to the contrary would actually deter self-regulation because computer service providers would be less inclined to institute such filtering technologies. *Id*. "Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory [(actionable)] material more frequently and thereby create a stronger basis for liability." *Id.* "Instead of subjecting themselves to further possible lawsuits [and bolstering their adversaries' claims], service providers would likely eschew any attempts at self-regulation." *Id.*

The Court also rejects Plaintiff's contention that *United States v. Texas*, 507 U.S. 529, 113 S.Ct. 1631, 123 L.Ed. 245 (1993) requires a restrictive interpretation of Section 230 in this case. According to Plaintiff Austin, because the statute does not expressly provide immunity for "distributors" of third-party information, interpretive canons favoring retention of common law principles mandate a restrictive reading of the immunity granted under § 230. *See Texas*, 507 U.S. at 534, 113 S.Ct. at 1634-35, 123 L.Ed. 245; *Zeran*, 129 F.3d at 333-334. While it is true that *United States v. Texas* recognized that Courts must favor well-established common law principles unless Congress has spoken directly to the issue, it also recognized within the same decision "…that abrogation of common law principles is appropriate when a contrary purpose is

evident." *Zeran*, 129 F.3d at 334. "'The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lesson the scope plainly intended to be given to the measure." *Id.* (citing *Isbrandtsen Co. v. Johnson*, 343 U.S. 770, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294 (1952) (quoting *Jamison v. Encarnacion*, 281 U.S. 635, 640, 50 S.Ct. 440, 442, 74 L.Ed. 1082 (1930)). Contrary to Plaintiff Austin's contentions and consistent with the reasons stated herein, limiting §230's immunity to website operators who are acting as "primary publishers" as distinguished from "distributors" is inconsistent with the express language of the statute and its purpose. Accordingly,

IT IS ORDERED granting Defendant CrystalTech's Motion for Summary Judgment.

IT IS FURTHER ORDERED denying Plaintiff Austin's Cross-Motion for Summary Judgment.

II. Defendant Daniels' Motion to Dismiss For Lack Of Personal Service and Lack of Personal Jurisdiction.

Defendant Daniels requests that the Court dismiss all Plaintiff Austin's claims, asserting lack of personal jurisdiction and lack of personal service. Because the Court finds that it does not have personal jurisdiction of Defendant Daniels, it is unnecessary to address the personal service issue.

A court may exert either general or specific jurisdiction. Apparent from the pleadings, Plaintiff Austin does not contend that this Court has general jurisdiction. Defendant Daniels has no physical presence, offices or property in Arizona upon which to justify general jurisdiction. *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 270, 736 P.2d 2, 4 (1987). Plaintiff Austin's assertion of personal jurisdiction over defendant is premised on *specific jurisdiction*.

"Arizona will exert [specific] jurisdiction over a nonresident litigant to the maximum extent allowed by the federal constitution." *Uberti v. Leonardo*, 181 Ariz. 565, 569, 892 P.2d 1354, 1358, *cert. denied*, 516 U.S. 906, 116 S.Ct. 273, 133 L.Ed.2d 194 (1995); *Rollin v. William V. Frankel & Co., Inc.*, 196 Ariz. 350, 353, 996 P.2d 1254, 1257 (App. 2000). Under the federal constitution, due process mandates that the nonresident defendant have sufficient "minimum contacts" with the forum state and that the court's exercise of jurisdiction is reasonable. *Rollin*, 196 Ariz. at 353, 996 P.2d at 1257. A finding of "minimum contacts" is appropriate only where the defendant has engaged in actions purposely directed toward the forum state. *Uberti*, 181 Ariz. at 570, 892 P.2d at 1359; *Rollin*, 196 Ariz. at 353, 996 P.2d at 1257. Furthermore, federal constitutional standards require that plaintiff's claim "arise out of or relate to the defendant's forum activities before the forum state." *Rollin*, 196 Ariz. at 354, 996 P.2d at 1258 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528, 541 (1985); *Helicopteros Nacionales de Columbia, S.Z. v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80

L.Ed.2d 404, 411 (1984); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998)). "If the nonresident defendant's forum-related activities 'are not sufficiently connected for [the] court to conclude that the plaintiff's claim arises out of' those activities, dismissal is warranted." *Rollin*, 196 Ariz. at 354, 996 P.2d at 1258 (quoting *Westphal v. Mace*, 671 F.Supp. 665, 668 (D.Ariz.1987)).

In response to Defendant Daniels request for dismissal, Plaintiff Austin contends that the Court may exercise personal jurisdiction over Defendant Daniels because "Defendant has purposely availed himself of the benefits and protections of the laws of the state of Arizona through his contacts with the CrystalTech corporation and his Internet-related marketing activities and business transactions performed with the citizens of Arizona."

The first requirement to support *specific jurisdiction* is "minimum contacts" with Arizona. In order to establish "minimum contacts" there must be evidence that Defendant Daniels purposely directed his business activities toward Arizona (purposeful availment). *Uberti*, 181 Ariz. at 570, 892 P.2d at 1359; *Rollin*, 196 Ariz. at 353, 996 Ariz. at 1257. In direct support of their arguments on sufficient "minimum contacts," both Plaintiff and Defendant rely on *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997), a case in which the Ninth Circuit applied the "minimum contacts" standard to a defendant's internet related activities.

In *Cybersell*, an Arizona corporation that advertised for commercial services over the Internet, under service mark "Cybersell," brought an infringement action against a Florida corporation that offered web page construction services over the Internet. 130 F.3d at 415. There was no evidence that defendant had either conducted commercial activity over the Internet in Arizona or directed its advertising efforts toward Arizona. *Id*. at 419. The only interaction defendant had with Arizona was the fact that it had posted a website, using the name "Cybersell," which plaintiff was in the process of registering. *Id.* Applying Arizona law, the Ninth Circuit Court of Appeals upheld the District Court's dismissal for lack of personal jurisdiction finding the mere fact defendant's website could be accessed by individuals in Arizona was insufficient to establish "minimum contacts." *Id.* at 416, 419-420. The court concluded that there needed to be "something more" to demonstrate that the defendant directed his activities toward the forum state. *Id.* at 418.

Plaintiff Austin contends that, unlike defendant in *Cybersell*, Defendant Daniels purposefully directed Internet-related marketing and business activities toward the state of Arizona. The only specific evidence of business activities directed toward Arizona proffered by Plaintiff Austin is the contractual relationship between Defendant Daniels and CrystalTech, an Arizona corporation. Plaintiff Austin offers no specifics as to the amount of business Defendant Daniels has conducted in Arizona or advertising in which Defendant specifically directs toward Arizona. Contrary to Plaintiff Austin's assertions, the Court fails to see the distinction between the facts in this case and those of *Cybersell.* Like the defendants in *Cybersell*, there is no evidence that Defendant Daniels directed advertising specifically toward Arizona or that Defendant conducted business in Arizona. The defendant in *Cybersell* hosted a website which

offered web page construction services to those who were interested. Defendant Daniels' similarly hosts a website (baldidiscovery.com) which offers services. Defendant Daniels only connection with the State of Arizona is a contractual relationship with the web hosting company which enabled Defendant to host his website. Defendant Daniels "did nothing to *encourage* people in Arizona to access its site, and there is no evidence that any part of its business (let alone a continuous part of its business) was sought or achieved in Arizona." *Cybersell*, 130 F.3d at 419. Defendant Daniels has not purposefully availed himself of the benefits and protections of the laws of the state of Arizona.

Plaintiff Austin also relies on the "effects doctrine," established in *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984) and applied in *Panavision*, to satisfy the "purposeful availment" requirement. In tort cases, jurisdiction may attach if the defendant's conduct is aimed at or has an effect in the forum state. *Panavision*, 141 F.3d at 1321. Under *Calder*, personal jurisdiction can be based upon: "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered-and which the defendant knows is likely to be suffered-in the forum state." *Id.* (quoting *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1486 (9th Cir.1993).

In *Panavision*, the defendant had *purposefully* registered plaintiff Panavision's, trademarks as his domain names on the Internet in an effort to force Panavision's California office to pay the defendant money. *Id.* at 1321. Panavision was a Delaware limited partnership with its principal place of business in California. The Court of Appeals upheld the District Court's determination of personal jurisdiction under the "effects" test, relying on defendant's purposeful intent and actions specifically *directed* at causing harm in California. *Id.* at 1322. The court recognized "...that simply registering someone else's trademark as a domain name and posting a web site on the Internet is not sufficient to subject a party domiciled in one state to jurisdiction of another." *Id.*

Defendant's Daniels limited conduct in Arizona in this case in no way reaches the level upon which the court in *Panavision* found personal jurisdiction. Defendant Daniels has not purposely engaged in activities which have caused harm in Arizona. The alleged harm upon which Plaintiff Austin bases his claim is defamatory statements posted on the Internet. Plaintiff Austin is not a resident of Arizona and the alleged defamatory statements in no way are associated with Arizona, with the exception of Defendant's contractual relationship with Crystal Tech. Defendant Daniels alleged conduct of posting defamatory statements on the Internet was neither aimed at nor did it have an effect in Arizona. Defendant Daniels' contractual relationship, alone, in no way satisfies the requirements of the "effects doctrine."

Under the traditional analysis of purposeful availment or the "effects doctrine," there are not sufficient "minimum contacts" upon which this Court can exercise personal jurisdiction over Defendant Daniels.[3] Accordingly,

IT IS ORDERED granting Defendant Daniels' Motion to Dismiss for Lack of Personal Jurisdiction.

IT IS FURTHER ORDERED that the requirements of Rule 58(d), Rules of Civil Procedure are waived out of necessity, on the part of the Court to shorten the administrative time involved in the processing of a separate written order and in the interest of judicial economy. Accordingly,

IT IS ORDERED signing this minute entry as a formal Order of the Court this date.

/ s / HONORABLE CATHY M. HOLT

JUDICIAL OFFICER OF THE SUPERIOR COURT

[3] Defendant and Plaintiff also cite to *Zippo Mfg. Co. v. Zippos Dot Com, Inc. 952 F.Supp. 1119 (W.D. Pa. 1997)* in support of their contentions. In light of the Court's conclusion that there are not sufficient minimum contacts to support personal jurisdiction over Defendant Daniels, it is unnecessary to address the parties' arguments under *Zippo*.